No. 16,264

IN THE

United States Court of Appeals

For the Ninth Circuit

YOUNG AH CHOR,
Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States of America,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Civil No. 1110.

APPELLEE'S ANSWERING BRIEF.

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JURISDICTIONAL STATEMENT.

Appellee agrees with the jurisdictional statement set forth by Appellant on pages 1 to 2 of his Opening Brief.

STATEMENT OF THE CASE.

In 1951, Appellant and Young Ah Kwai applied for United States passports from the American consul at Hong Kong, B.C.C. (R-128, R-156). Appellant and Young Ah Kwai were both born in China, in Sun Mun

Tung Village (R-127, R-152), and resided in Hong Kong at the time of such application, although they claimed the Territory of Hawaii as their permanent residence (R-127, R-155).

Their applications were denied (R-134, R-156), and they thereafter commenced this action in the District Court of Hawaii.

At trial, Appellant and Young Ah Kwai maintained that they were the sons of Young Yick, who in 1950 had been adjudicated to be a United States citizen (R-36).

Young Yick (R-16), Young Ah Kwai (R-152) and Appellant (R-125) testified at trial. Their testimony was taken primarily through a government interpreter, the use of whom, as Appellant's counsel stated, "both sides prefer," and to whose use Appellant had no objection (R-34).

At various times during the trial, the interpreter's choice of Chinese words was corrected or questioned by Appellant's counsel (e.g., R-96 and 97, R-104), who appeared to be fluent in the same dialect as that used by the witnesses (R-126, R-205).

The use of the interpreter has given rise to Appellant's first specification of error (Opening Brief, p. 13), in that Appellant urges that the trial court may not evaluate the conduct and credibility of witnesses who testify, through an interpreter, in a language unfamiliar to the Court, although it does not affirmatively appear anywhere in the record that the trial court actually was unfamiliar with such language.

Witness Young Yick testified that Young Ah Kwai and Appellant were his sons. On cross-examination, and over continuing objection, Appellee was allowed to question Young Yick, for purposes of impeachment, as to discrepancies among present and prior statements made by him (R-71 through R-123).

Appellant's second specification of error alleges error by the trial court in allowing such impeaching cross-examination.

As a part of the defense, Appellee offered and read the duly taken deposition of Young Hon Sun (R-213), who had been born and reared in the same Chinese village as Young Ah Kwai and Appellant (R-215 and 216), where the witness had been a classmate of Young Ah Kwai (R-218). This witness and Young Ah Kwai are cousins (R-258 to R-260).

This witness knew and identified by photograph Young Ah Kwai's father as Young Yick (R-218 and 219), knew and identified by photograph Young Ah Kwai's brother, named Young Jip (R-219), and knew and identified their mother (R-220). Although this witness did not know whether there were other children born to that mother and Young Yick (R-221), he did know that Young Yick had other brothers (R-222 to R-226).

This witness knew Appellant (R-227) and identified him by photograph (R-230).

This witness knew Appellant to be the son of one of the brothers of Young Yick (R-227, R-230), rather than the son of Young Yick himself.

Certain of the answers presented by the deposition of Young Hon Sun were objected to by Appellant, and gave rise to Appellant's third, fourth and sixth specifications of error.

The testimony of deponent Young Hon Sun was strengthened by the testimony of Appellant's own rebuttal witness, Young Chung, whose statement was likewise taken by deposition (R-283).

Young Chung, who had been the chief of Sun Mun Tung Village (R-287) and likewise had been the Acting School Headmaster at that village, knew Young Ah Kwai (R-288), and knew that his father's name was Young Yick (aka Yick Cheung) (R-289).

Although this witness could identify Appellant's photograph (R-290), he became very nervous immediately thereafter, and would not give a direct answer when asked the name of Appellant's father (R-291).

The testimony given by Young Hon Sun, the Court believed to be the only credible evidence (R-21), and upon such testimony concluded that Young Ah Kwai was the son of Young Yick (R-23), and was therefore entitled to judgment declaring him to be a national of the United States (R-23).

The Court also found and concluded that the preponderance of the evidence had established that Appellant, the co-petitioner of Young Ah Kwai, was not the son of Young Yick (R-22 and 23).

This finding and conclusion by the Court has given rise to Appellant's fifth specification of error.

ARGUMENT.

SUMMARY.

Appellant failed to prove his case, because the trial court simply could not believe his witnesses, and because his rebuttal witness would not substantiate Appellant's claim.

Prior statements by a witness are legitimate cross-examination for purposes of impeachment.

The testimony of Young Hon Sun with regard to pedigree was properly admissible, both because he is related and because of the common community emphasis upon knowledge of pedigree among rural Chinese.

The findings of the lower court are not clearly erroneous.

POINT I. APPELLANT FAILED TO PROVE HIS CASE.

A. The Trial Court Could Not Believe Appellant or His Witnesses.

Appellant's case was built upon his own testimony, the testimony of his alleged father, Young Yick, and upon the testimony of Young Chung, the former village chief.

The trial court stated in oral decision that Appellant's testimony did not inspire confidence (R-19), commented upon the unreliability of Young Yick's testimony (R-15 and 16), and found that their testimony was not credible (R-21).

Appellant now maintains that the demeanor of those witnesses was unfairly judged, for the reason

that those witnesses were testifying in a foreign language. Appellant urges the proposition that demeanor, like language, must be translated.

Appellee agrees with Appellant that this is a novel proposition. Certainly, no cases have been found which relate to the proposition. This being true, Appellant has been reduced to arguing by analogy that the trial judge is, in a manner of speaking, a witness.

Appellant also contends that there may have been wrong interpretations in the translation, although no specific instances are cited or challenged.

Neither of these contentions have merit. *First,* as to the apparent demeanor of the witnesses, there can be no doubt that the trier of fact must accept the exhibited conduct of a foreign-language witness as being natural and intended, unless shown to be otherwise. The burden of showing otherwise is upon him who offers such witness, just as the offerer has the burden of providing the translation. Thus, if the witness scratches, the trier of fact naturally assumes that the witness itches; the burden is upon the offeror of such witness to show that "scratching," when translated, means "cross-my-heart," or that a tongue in cheek and a shifty eye, when translated, mean honesty of statement.

At trial, no such showing was made by Appellant or even suggested, and so the trial court took the demeanor of Appellant and his alleged father at face value.

Appellant seems to urge that the trial court was obligated to judge only the bare words of the wit-

nesses, as translated. But as this Court stated in *Nishikawa v. Dulles,* 235 F.(2d) 135 (9th Cir. 1956), at page 140,

> "The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness. . . . This rule is particularly true where the witness is interested in the outcome of the case. . . ."

Second, as to Appellant's contention that there "may" have been wrong interpretations in the translation, it need only be stated that the interpreter used at trial was so used with the express consent and preference of Appellant, that Appellant's own counsel appears on the record to be fluent in the particular foreign language, and that corrections and suggestions as to the interpretation were made by such counsel from time to time. Appellant or his counsel having failed to object or otherwise comment upon the remainder of the translation at trial, the conclusive presumption arises that the translation was correct.

B. Appellant's Only Disinterested Witness Would Not Support Appellant.

Young Chung, the remaining member of Appellant's testifying triumvirate, was called by Appellant to rebut the testimony of Young Hon Sun. Although Young Chung knew Young Yick, and knew that Young Ah Kwai was a son of Young Yick, the witness would do no more than identify Appellant by photograph. When asked (R-291) the name of Appellant's father, the witness did not answer the direct

question. Moreover, the witness was never thereafter asked the same, most pertinent question.

Thus, rather than there existing clearly erroneous findings as required under Rule 52(a) of the Federal Rules of Civil Procedure, the record affirmatively and substantially shows that Appellant did not prove his case: he and his father were through their actual demeanor and inconsistencies found not worthy of belief, and Appellant's one disinterested witness would not verify Appellant's claimed kinship.

POINT II. IT WAS NOT ERROR TO ADMIT EVIDENCE IMPEACHING THE TESTIMONY OF YOUNG YICK.

Appellant specifies as error the admission for impeachment of statements made during the adjudication of Young Yick's citizenship in 1950, and statements made prior thereto. Appellant argues that Young Yick's citizenship is *res judicata,* and that his testimony herein may not be impeached by his inconsistent statements heretofore. Appellant argues that because such impeaching evidence was allowed, "The Trial Court was allured [sic] into a prejudicial frame of mind against appellant's case. . . ."

Appellant's asserted legal position, and the effect upon the trial court, are both wrong.

The trial court did not readjudicate Young Yick's citizenship; indeed, the trial court specifically stated that it was bound by the prior adjudication (R-15), so found (R-21), and so concluded (R-22 and 23),

although it did express dissatisfaction with the prior adjudication (R-15).

The allowance of evidence was strictly for impeachment purposes only, was so stated by Appellee (R-71, R-77), and was allowed by the trial court on that basis (R-71, R-72, R-73 and 74, R-77 and 78).

The allowance by the trial court of such prior statements was correct. As this Court stated in *Wong Ken Foon v. Brownell,* 218 F.(2d) 444 (9th Cir. 1955), at page 446,

> "It is legitimate cross-examination to confront a witness with former statements and permit or request him to explain." *See Louie Hoy Gay v. Dulles,* 248 F.(2d) 421 (9th Cir. 1957).

As to the alleged "prejudicial frame of mind" of the trial judge because of the allowance of such impeaching evidence, it is difficult to believe that such could have occurred, since the trial judge held that Young Ah Kwai, Appellant's equal and co-plaintiff, had established by a preponderance, and was entitled to a declaration of United States nationality. Yet Young Yick, the impeachment of whom caused the alleged prejudicial frame of mind, had been a witness for both the successful claimant, Young Ah Kwai, and the unsuccessful claimant, the Appellant here.

POINT III. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF YOUNG HON SUN.

Appellant urges that Young Hon Sun was not qualified to testify as to the family relationships in ques-

tion, since he was not a member of the family, and since his testimony was based upon community reputation.

Appellant fails to consider that a relationship to the family by the declarant, no matter how slight, is sufficient, *Fulkerson v. Holmes,* 117 U.S. 389 (1886), and that the witness testified that, according to Appellant's alleged brother, Young Ah Kwai, the witness is a cousin (R-258 to R-260). This relationship was not rebutted by Appellant, although both Young Yick and Young Ah Kwai were called in rebuttal (R-276, R-281). Accordingly, the witness' apparent relationship stands uncontroverted, and his statements therefore are the direct declarations of a member of the family, rather than of a stranger.

Such pedigree testimony is generally limited so as to provide a greater basis of credibility. But it should be remembered that that basis for the rule relates to credibility, and that, as in this case, the trier of fact should be allowed to hear such testimony, and make his own determination of the weight to be given it, particularly where the family relationship under question existed in a small, rural community, where general reputation of pedigree tends to be well-known and accurate. *See,* for a discussion thereof, *United States v. Mid-Continent Petroleum Corp.,* 67 F.(2d) 37, 45 (10th Cir. 1933). And, as established by the witness, matters of family relationships were of vital interest in the Chinese village, births being declared (R-251), and family records being maintained in the ancestral halls, as a common and public reference

(R-250). Indeed, the very presence and name of an "ancestral hall" indicates the great interest and emphasis, and hence, accuracy, upon matters of pedigree, within the entire community in that village.

Therefore, the trial court did not err in admitting such testimony by Young Hon Sun, for the reason that he was a relative testifying as to his own knowledge, and for the additional reason that the basis of his own knowledge was the strong interest and emphasis upon matters of pedigree in that Chinese village.

CONCLUSION.

The findings by the trial court were not clearly erroneous. Appellant failed to prove his case, because his witnesses both could not be believed and could not substantiate his claim. Therefore, the judgment of the lower court must be affirmed.

Dated, Honolulu, Hawaii,
February 9, 1959.

Respectfully submitted,

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